# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes CNL, LAT, PSF, LRE, OLC, FFT

Introduction

The Tenant applies for the following relief under the *Residential Tenancy Act* (the "*Act*"):

- An order under s. 49 to cancel a Two-Month Notice to End Tenancy dated August 31, 2021 (the "Two-Month Notice");
- An order under s. 70 authorizing the Tenant to change the rental unit's locks;
- An order under s. 65 that the Landlord provide services or facilities required by the tenancy agreement;
- An order under s. 70 restricting the Landlord's right of entry into the rental unit;
- An order under s. 62 that the Landlord comply with the *Act*, Regulations, and/or the tenancy agreement; and
- An order under s. 72 for return of the Tenant's filing fee.

C.C. appeared on her own behalf as Tenant. She was assisted by M.M., who did not provide evidence during the hearing. The Landlord, C.C., attended the hearing and was represented by C.B. (articling student).

The parties affirmed to tell the truth during the hearing. M.M. provided no evidence and was not affirmed. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing.

The Landlord advises that they served the Two-Month Notice by posting it to the Tenant's door on August 31, 2021. The Tenant acknowledges receiving the Two-Month Notice on August 31, 2021. I find that the Two-Month Notice was served in accordance with s. 88 of the *Act* and was received by the Tenant on August 31, 2021.

The Tenant advises that she served the Notice of Dispute Resolution on the Landlord by way of registered mail sent on September 16, 2021. The Landlord acknowledges receipt of the Notice of Dispute Resolution. The Tenant advises that she served her evidence on the Landlord by way of registered mail sent in the initial package on September 16, 2021 and in a second registered mail package sent on December 22, 2021. The Landlord acknowledges receipt of the Tenant's evidence. I find that the Tenant's application and evidence were served in accordance with s. 89 of the *Act* and was acknowledged to have been received by the Landlord.

The Landlord advises that she served responding evidence on the Tenant by way of registered mail sent on December 23, 2021. The Tenant acknowledges receipt of the Landlord's responding evidence. I find that the Landlord has served their responding evidence in accordance with s. 89 of the *Act* and that the Tenant has acknowledged receipt of the same.

Preliminary Issue – Tenant's Claim

The Tenant applies for various and wide-ranging relief. Pursuant to Rule 2.3 of the Rules of Procedure, claims in an application must be related to one another. Where they are not sufficiently related, I may dismiss portions of the application that are unrelated. Hearings before the Residential Tenancy Branch are generally scheduled for one-hour and Rule 2.3 is intended to ensure disputes can be addressed in a timely and efficient manner.

I find that the primary issue in the Tenant's application relates to whether the tenancy will continue, or end, based on the Two-Month Notice. Indeed, the other claims raised by the Tenant in her application would be moot if the tenancy ends and an order for possession made. Accordingly, I find that the Tenant's claims under sections 62 (order that the Landlord comply), 65 (order that the Landlord provide services), 70 (restricting the Landlord's right of entry), and 70 (authorization to change the locks) are not sufficient related to the issue raised by the Two-Month Notice. On this basis, I dismiss these aspects of the Tenant's application. If the tenancy continues, they will be dismissed with leave to reapply. If the tenancy ends, they will be dismissed without leave to reapply.

Issue(s) to be Decided

1) Whether the Two-Month Notice should be cancelled?

2) If not, is the Landlord entitled to an order for possession?
3) Is the Tenant entitled to the return of her filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issue in dispute will be referenced in this decision.

The parties confirmed that the tenancy began on January 1, 2020. The rental unit is a basement suite within a single detached home. The Landlord lives upstairs. Rent of $1,000.00 is due on the first day of each month. The Landlord confirmed holding a security deposit of $500.00 in trust for the Tenant.

This is not the first two-month notice to end tenancy issued by the Landlord. A previous two-month notice, dated February 27, 2021, was successfully disputed by the Tenant in a previous application. The file number for the previous dispute is listed in the style of cause above for ease of reference. A copy of the previous decision, dated June 9, 2021, was put into evidence by the Tenant. The Landlord filed for review considerations of the June 9, 2021 decision on June 11, 2021. The Landlord was unsuccessful in her review application and the original decision was left undisturbed. The review decision was put into evidence by the Tenant.

The Landlord served the Two-Month Notice on August 31, 2021 on the basis that she wishes to occupy the rental unit to set up an exercise area. At the hearing, I was advised that the Landlord suffers from a chronic injury that requires her to exercise. A note from the Landlord's physician dated May 21, 2021 was put into evidence by the Landlord, in which the physician says that the Landlord has severe back pain and recommends exercise and stretching for the Landlord.

The Landlord says there is insufficient space on the main floor of her house or in the garage to accommodate an exercise area. She says that she runs a business from her home which requires the use of one of the rooms. The Landlord provides photographs of the room in which she runs her business and has a provided a floor plan of the basement to show the basement suite occupied by the Tenant. In total, the Landlord says there are three rooms on the main floor, comprising of a guest bedroom, an office (which is used as storage for her business), and her personal bedroom. The Landlord

says her garage is used for storage and for parking her car, and therefore cannot accommodate a home gym.

The Landlord's representative emphasized that the Landlord has no mortgage on the property and that the only registered debt is a personal line of credit. It was argued that the Landlord did not need rent to make payments and that the Landlord had no intention to re-rent the basement suite. The Landlord says it is strictly her intention to re-occupy the basement suite to set up a home gym, which was argued to be particularly necessary given the current restrictions to public gym access due to the COVID-19 Pandemic.

The Tenant argues that the present Two-Month Notice is essentially a rehearing of the same matters raised by the Landlord in the previous dispute. This includes the same evidence. The Tenant says that the previous findings made by the arbitrator at the initial hearing constrain my ability to find that the present Two-Month Notice was issued in good faith. The Tenant argues that the Landlord's proper course is to file for judicial review of the previous decision.

The Tenant further argues that the Two-Month Notice was not issued in good faith and that the Landlord has ample room to set up a gym elsewhere in the residential property. In particular, the Tenant says there is an additional room in the basement, which she has no access, that could be used as a gym.

Analysis

The Tenant applies to cancel the Two-Month Notice and for return of her filing fee.

In accordance with s. 49(3) of the Act, a landlord may end a tenancy with two months notice where the landlord or a close family member intends, in good faith, to occupy the rental unit. It is the Landlord's obligation to prove, on a balance of probabilities, that the Two-Month Notice was issued in good faith.

The issue with the present Two-Month Notice is that it bears a striking similarity to the one issued on February 27, 2021. I have reviewed the June 9, 2021 decision and the review consideration decision. I have also reviewed the evidence that was submitted by the parties for the previous hearing and the review application. The Landlord has replicated evidence from the previous hearing in the present matter.

At the previous hearing, the Landlord said that she needed the space as a media room, a rec room, and a craft room. Here it is argued that the basement is needed for a home gym. The letter from the Landlord's physician of May 21, 2021 was not before the arbitrator in the original decision but was submitted by the Landlord in support of her review application.

Essentially, the Tenant argues the issue of the Two-Month Notice has been decided and that the matter is *res judicata*, which is to say it has already been decided and cannot be reopened.

In *Khan v Shore*, 2015 BCSC 830 ("*Khan*"), Fisher J. explored the issue of *res judicata* in the context of multiple notices to end tenancy. The landlord in *Khan* had issued notices to end tenancy for the same cause on previous occasions and those previous notices were cancelled when they were disputed by the tenant. The arbitrator for the original decision in *Khan* upheld the notice to end tenancy and granted an order for possession despite the notice having the same cause as those listed in the previous notices. Ultimately, Fisher J. upheld the arbitrator's decision on the basis that though the notices all had the same cause, the facts that underlined the notices were different.

Fisher J. goes on to state that an arbitrator at the Residential Tenancy Branch may consider and apply *res judicata* and that it was previously held by the BC Supreme Court that an arbitrator has no jurisdiction to hear a matter that has already been decided by another arbitrator (see para 35).

The following is stated in *Khan* at paragraphs 29 with respect to the doctrine of *res judicata*:

> [29] The doctrine of *res judicata* is based on the community's interest in the finality and conclusiveness of judicial decisions and the individual's interest in protection from repeated suits for the same cause. In *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180, the BC Court of Appeal reviewed these principles, stating this at para. 26:
>
> > Appellate courts in Canada have emphasized that the importance of finality and the principle that a party should not be 'twice vexed' … for the same cause, must be balanced against the other "fundamental principle" … that courts are reluctant to deprive litigants of the right to have their cases decided on the merits: see *Toronto (City) v. Canadian Union of*

> *Public Employees, Local 79*, 2003 SCC 63, at para. 55; *Revane v. Homersham,* 2006 BCCA 8, at paras. 16-7; Lange at 7-8.

(emphasis in original)

Here, the primary difference between this hearing and the last is that the Landlord argues that the rental unit is needed for a gym rather than a media/rec room. The Landlord argues that the gym is medically necessary based on a May 21, 2021 letter from her physician, that same letter being provided to the arbitrator on the Landlord's review application. As noted by the arbitrator in the review application, the May 21, 2021 could have been discovered prior to the June 8, 2021 hearing and presented as evidence at that time. The Landlord did not do so and the review application was dismissed.

I find that the facts of the Two-Month Notice are the same as those for the previous two-month notice of February 27, 2021, which was at issue in the previous application. Indeed, the Landlord has largely replicated the evidence from both applications. Though the medical justification was not raised at the June 8, 2021 hearing, it was raised on review and was specifically rejected as forming a basis for granting the review application. The principal reason is that the Landlord had the opportunity to present that argument at the June 8, 2021 hearing and failed to do so. I find that the Landlord is attempting to have a rehearing of the previous application and justifies this with a new argument that could have been raised in the hearing of June 8, 2021. The Landlord failed to do so.

Taking my guidance from *Khan*, I find that the issue raised by the Two-Month Notice is *res judicata* and has been determined by the previous arbitrator in which the Landlord was found to have issued the previous notice in bad faith. The Two-Month Notice represents the Landlord's attempt to repackage the same facts with a new justification for ending the tenancy and, essentially, asking for a do-over after her previous arguments were rejected. I do not have jurisdiction to hear a matter that has already been decided by the arbitrator in the previous application.

Given that the issue is *res judicata*, the Two-Month Notice is of no force or effect. The tenancy shall continue until it is ended in accordance with the *Act*.

Conclusion

The issues raised by the Landlord with the Two-Month Notice are *res judicata* and I do not have jurisdiction to hear a matter that has already been decided. The Two-Month Notice is of no force or effect and the tenancy shall continue until it is ended in accordance with the *Act*.

As the tenancy continues, those aspects of the Tenant's claim that were severed will be dismissed with leave to reapply.

The Tenant was successful in their application and she is entitled to the return of her filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Landlord pay the Tenant's filing fee. I exercise my discretion under s. 72(2) of the *Act* and direct that the Tenant withhold $100.00 from rent due to the Landlord on **one occasion** in full satisfaction of her filing fee.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: January 14, 2022

Residential Tenancy Branch